



State of Wisconsin  
Governor Scott Walker

## Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary

**DATE:** December 3, 2014

**TO:** Board of Agriculture, Trade and Consumer Protection

**FROM:** Ben Brancel, Secretary  
John Petty, Administrator, Division of Agricultural Resource Management

**SUBJECT: Fertilizer and Related Products; Rulemaking Scope Statement**

**TO BE PRESENTED BY:** Robby Personette and Amy Basel

### REQUESTED ACTION:

At the December 17, 2014 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve a "Statement of Scope" (copy attached) for proposed updates to the current ATPC 40, "Fertilizer and Related Products" rule. The updates will amend the current Fertilizer and Related Products rule, as necessary, to incorporate updates related to fertilizer content deficiencies, and updating the current formulas used in determining the economic value of fertilizer. These updates will reflect the relative average wholesale prices for the primary plant nutrients within a fertilizer product.

A scope statement spells out the general purpose and scope of a proposed rule. DATCP may not begin drafting a proposed rule (including a proposal to amend or repeal an existing rule) until the Governor approves a scope statement for the proposed rule and the DATCP Board approves the scope statement. In accordance with 2011 Wisconsin Act 21 (s.227.135(2), Stats.), the Governor approved this scope statement for permanent rule changes on November 7, 2014 thereby allowing DATCP to submit this scope statement for publication and to seek approval of the scope statement by the DATCP Board.

DATCP must publish a draft scope statement in the Wisconsin Administrative Register, and file a copy with the Department of Administration (DOA), at least 10 days before the Board approves the scope statement. DATCP filed the attached statement of scope with the Legislative Reference Bureau for publication in the November 30, 2014 issue of the Wisconsin Administrative Register. DATCP also filed a copy with DOA.

At the December 17 meeting, the Board may take action to approve or disapprove the attached scope statement. If the Board rejects the scope statement, DATCP may not proceed with the proposed rule. If the Board approves the scope statement, the Department will begin work to draft the permanent rule. Approval of a scope statement is just the first, preliminary step in a lengthy process for enacting permanent rules. The Board will have at least two further opportunities to review the proposed rule. The Board must approve a hearing draft rule before DATCP may hold public hearings on the rule proposal. The Board must also approve the final draft rule before DATCP may adopt the rule. The permanent rule will be effective when the final draft has been approved by the DATCP Board, approved by the Governor, completed the legislative review process and adopted by the Secretary.

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# STATEMENT OF SCOPE

## Department of Agriculture, Trade and Consumer Protection (DATCP)

Rule No.: Ch. ATPC 40, Wis. Admin. Code (Existing)

Relating to: Fertilizer Mislabeling

### 1. Description of the objective of the rule:

This proposed revision is limited to reviewing whether administrative rule section ATPC 40.14 ("ATPC 40.14"), which concerns labeling requirements for the nutrient contents of fertilizer, should be modified or updated. In particular, the current formula in ATPC 40.14 to determine the "economic value" of fertilizer nutrients will be reviewed. DATCP may also propose other modifications to ATPC 40.14 resulting from that review.

Fertilizer product labels must provide minimum guarantees of certain nutrients if those nutrients are represented as part of that fertilizer product. ATPC 40.14 provides criteria to establish whether a fertilizer's nutrient content falls below the label guarantees for those nutrients. If the criteria in the rule are not met, then the fertilizer is deemed mislabeled.

### 2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

Background and History. Under current law, DATCP is authorized to regulate the manufacture, distribution, and labeling of fertilizer. *See* Wis. Stat. §§ 94.64 to 94.645. Fertilizer is considered to be "any substance, containing one or more plant nutrients, which is used for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth ...." *See* Wis. Stat. § 94.64(1)(f). Administrative rules implementing fertilizer regulation are found in subchapter II of Wis. Admin. Code ch. ATPC 40.

Currently, ATPC 40.14 (titled "Fertilizer content deficiencies") identifies the criteria used to determine whether a fertilizer product label properly states the nutrient content of the product. Under one criterion, fertilizer is mislabeled if, based on a sample collected and tested as specified in the rule, "[t]he economic value of primary nutrients actually present is less than 98% of the economic value of the amounts guaranteed, where the economic value is calculated according to sub. (3)." *See* ATPC 40.14(1)(c). (Emphasis added.) The economic value formula provided in ATPC 40.14(3) states:

$$\text{Economic value} = \{[\text{total nitrogen (N) guarantee}] \times 2\} + \{[\text{total phosphate (P}_2\text{O}_5) \text{ guarantee}] \times 2\} + \text{soluble potash (K}_2\text{O) guarantee}$$

The multipliers in the economic value formula are based on wholesale costs of nitrogen, phosphate and potash, which may have changed since the formula was established in the 1970s and therefore could require revision.

Justification and Policies. Some fertilizer industry representatives have suggested that either the economic value formula or the percentage listed in ATCP 40.14 (1)(c), or both, need review. DATCP may examine whether the existing economic value formula accurately represents wholesale prices of these nutrients. DATCP may also examine whether “98% of the economic value of the amounts guaranteed” or another percentage should be used in the formula. DATCP may also review the other criteria described in ATCP 40.14 determine whether the nutrient content in the fertilizer falls below the fertilizer label’s percentage guarantees of those nutrients. DATCP may consider combinations of the above alternatives or consider other alternatives.

Additionally, DATCP may review ATCP 40.14 as a whole to determine if modifications or updates are needed. DATCP will seek input from the fertilizer industry, interested consumers, and the public at large to determine what, if any, changes are needed to address fertilizer mislabeling. DATCP may amend other rules that are directly impacted by a change to ATCP 40.14, if any.

Policy Alternatives. If this scope statement is approved, DATCP expects to look at various alternatives when reviewing the current fertilizer mislabeling rule, as described above. If DATCP does nothing, then DATCP will be unable to explore any concerns relating to mislabeling that have been posed by some members of the fertilizer industry.

### **3. Statutory authority for the rule (including the statutory citation and language):**

Wis. Stat. §§ 93.07 (1) and 94.64 (9) (b), (c), (d) and (f).

**93.07 Department duties.** It shall be the duty of the department:

(1) REGULATIONS. To make and enforce such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93 to 100, which regulations shall have the force of law.

#### **94.64 Fertilizer.**

\* \* \*

(9) RULES. The department may promulgate rules:

\* \* \*

- (b) Regulating the sale and labeling of fertilizer, including warning or caution statements or directions for use in connection with the labeling of fertilizer.
- (c) Governing methods of sampling, testing, examining and analyzing fertilizer.
- (d) Prescribing tolerances for deficiencies found in percentages of plant nutrient guaranteed to be present.

\* \* \*

(f) Establishing standards of identity and purity for fertilizer materials.

**4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:**

DATCP estimates that it will use approximately 0.5 FTE staff to develop this rule. That includes time required for investigation and analysis, rule drafting, preparing related documents, coordinating advisory committee meetings, holding public hearings and communicating with affected persons and groups. DATCP will use existing staff to develop this rule.

**5. Description of all entities that may be impacted by the rule:**

*Fertilizer manufacturers and labelers.* This rule revision may change the criteria currently being used to establish whether the nutrient contents of fertilizer meets the fertilizer's label guarantees of those nutrients and could include modification of the economic value formula. While this rule revision will not affect any nutrient percentage guarantees that the fertilizer industry makes on fertilizer labels, it may reduce the instances in which tested fertilizer products fail to meet existing labeling criteria in ATCP 40.14.

*Consumers of fertilizer products.* This rule revision may benefit fertilizer product consumers because the criteria that ensure accurate labeling of guaranteed amounts of nutrient content in fertilizer products will be reexamined and updated if needed.

**6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:**

There is no significant federal regulation of fertilizers, although there is a long history of regulation by states.

**7. Anticipated economic impact**

DATCP expects the proposed rule revision to have minimal to no negative economic impact statewide or locally.

**Contact Person:**

Amy Basel, Feed and Fertilizer Program Supervisor, DATCP; Phone (608) 224-4541

**GOVERNOR APPROVAL**

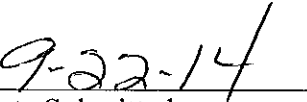
In accordance with 2011 Wisconsin Act 21, (Sec 227.135(2)) this scope statement was approved by the Governor on \_\_\_\_\_ (date) before DATCP took any action in proceeding with this proposed rule including submission of this scope statement for publication.

#### DATCP BOARD AUTHORIZATION:

DATCP may not begin drafting this rule revision until the Board of Agriculture, Trade and Consumer Protection (Board) approves this scope statement. The Board may not approve this scope statement sooner than 10 days after this scope statement is published in the Wisconsin Administrative Register. If the Board takes no action on the scope statement within 30 days after the scope statement is presented to the Board, the scope statement is considered approved. Before DATCP holds public hearings on this rule, the Board must approve the hearing draft. The Board must also approve the final draft rule before the department adopts the rule.



Ben Brancel  
Secretary  
Department of Agriculture, Trade and  
Consumer Protection



Date Submitted